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Supreme Court of the United States

OCTOBER TERM, 1955

No. 216

THE ITEM COMPANY
Petitioner

versus

NATIONAL LABOR RELATIONS BOARD
Respondent

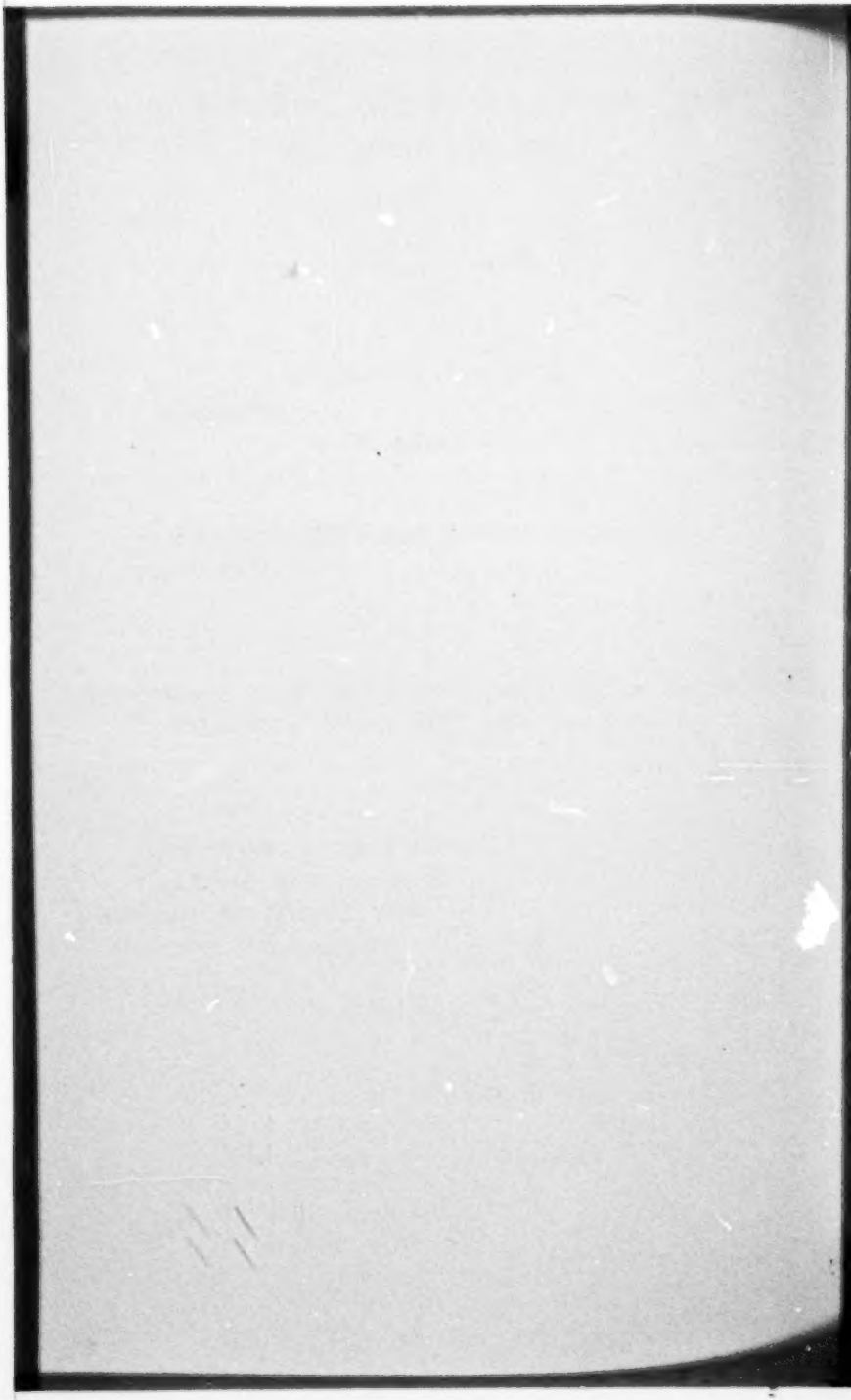
PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No.

THE ITEM COMPANY

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit; and in support of its petition respectfully shows:

OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals, rendered on April 6, 1955, reported at 220 F2d 956, is reprinted in the appendix hereto. Rehearing was denied on May 17, 1955.

Jurisdiction of this court lies under 28 USC 1254 and 29 USC 160(e).

QUESTION PRESENTED

The important question of federal statutory construction, novel in this court, presented for review, is:

> Does the National Labor Relations Act require an employer, in bargaining with a union of which all affected employees are members, to disclose detailed confidential information as to merit wage increases given, concededly without discrimination, to members of the union, when the question of merit raises had expressly been excluded from the subjects of bargaining, the desired information had no relevance to any phase of the bargaining, and the union could conveniently obtain the desired information from its own members if they were willing to disclose it?

The importance of this question is pointed by the Labor Board's own recent comment on "the unusually large number of cases coming before the Board involving the issue", and on "the disturbing effect upon collective bargaining of the disagreements which" have arisen with regard to it.*

Six of the courts of appeals have considered the issue. This court has recently denied certiorari in one of these cases.

No four-square conflict in holdings between circuits is involved; but the instant decision goes further than any other had yet gone, presents a direct conflict, in one

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* *NLRB vs Whitin Machine Works,* 108 NLRB 1537, aff'd., 217 F2d 593 (CA 4-1954), cert. den., 349 US 905.

of its aspects, with the expressed rationale of an opinion by the First Circuit—a rationale whose continued validity has itself been drawn in doubt by a subsequent decision of the same court—and is based in substantial part on an apparent misapplication of a recent decision by this court.

STATUTES INVOLVED

National Labor Relations Act, Section 8(a)(5), 29 USC 158(a)(5):

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ."

National Labor Relations Act, Section 8(d), 29 USC 158(d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

STATEMENT OF THE CASE

In late 1952, petitioner, the publisher of The New Orleans Item, began negotiations with the New Orleans

Newspaper Guild, representing a group of its editorial employees, all members of the union, for renewal of their existing collective bargaining agreement.[1]

The expiring agreement, like all prior employment contracts which had been in effect between the parties over a period of many years, was a minimum-wage contract, under which granting of merit wage increases was expressly reserved as a prerogative of management.[2]

At the beginning of negotiations, the union requested petitioner to furnish it with detailed payroll information as to each employee, including the "date and amount of any merit increases in the past year".[3]

Petitioner furnished all of the information requested, except that petitioner refused to identify the specific merit increases given to particular employees by name.[4]

Petitioner's position in refusing to divulge this information was that, first, the information had no conceivable relevance to any subject of collective bargaining between petitioner and the union; and second, the information, which petitioner's employees had apparently refused to disclose to their own union, is held by petitioner in confidence for the employees concerned.

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[1] R 57-60. The negotiations covered some employees other than those in the news department, but the latter alone are involved in the controversy at bar. R 58.

[2] R 60; App. 12, 21, 22-23, 41, 59-60, 65; Resp. Exhs. 2 and 3 (App. 93, 100). References herein to "App.", are to the portions of the record printed in the appendix to petitioner's (there respondent's) brief in the Court of Appeals. References herein to "App. *post*", are to the appendix of the within petition for certiorari.

[3] R 59-61; App. 22; Resp. Exhs. 5 and 8 (App. 83-84, 101-103).

[4] R 60; App. 7; Resp. Exh. 2 (App. 94), 6, 7 (App. 85-92).

All fifty of petitioner's editorial employees of the group represented by the Guild were members of that union, and were centrally located in one building. The union made no attempt to show why it should not obtain the desired information from its own members, if they wished to reveal it.[5]

The union's position was that it needed the information to "determine whether the present contract is being properly applied";[6] but it is not disputed that petitioner has in fact never discriminated against union members or officers in the granting of merit wage increases.[7]

Nor is it disputed that the union has never bargained with petitioner as to merit wage increases, and that petitioner has always granted such increases unilaterally, as a conceded prerogative of management.[8]

The present proceedings were initiated by the Guild in November 1952, by filing an unfair-labor-practice charge based on petitioner's refusal to furnish the information withheld.[9]

Several months later, in February 1953, petitioner and the union signed a new collective-bargaining agreement, which again recognized management's exclusive prerogative to grant merit wage increases, and pointedly did not require petitioner to notify the union of any such increases.[10]

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[5] R 58; App. 24, 60, 61, 64.
[6] R 61; App. 11, 46-47; Resp. Exh. 5 (App. 83-84).
[7] App. 28-29, 39, 48, 66.
[8] R 60; App. 12, 21, 22-23, 41, 59-60, 65.
[9] R 7-10, 61.
[10] R 61-62; App. 12, 22; Resp. Exh. 2 (App. 93-99).

Respondent's trial examiner nevertheless found that the disputed information was relevant "for administrative and policing purposes", specifically to enable the union "to determine whether (petitioner's) policy on merit increases disclosed any discrimination against union members".[11]

Respondent adopted the findings and conclusions of its trial examiner, and ordered petitioner to furnish to the union "the names identified with the respective merit increases, if any, granted to the employees in said unit during the preceding year, and the exact wages of each employee in the unit".[12]

On respondent's petition, the Court of Appeals held that the order should be enforced, on the ground that " 'wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement' ".[13]

Petitioner's contention that it should not be compelled to betray its employees' confidence by disclosure of wage information to their union, was rejected on the ground that

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[11] R 63. The trial examiner had himself stated expressly that "there is nothing in the record to show there has been any discrimination or even any alleged". App. 29. It had in fact been conceded throughout the hearing that petitioner had never discriminated in the granting of merit increases. See note 7, *supra*.

[12] R 50-52.

[13] 220 F2d at p. 958, App. *post*, p. 15. Quoting from the opinion by respondent itself in *NLRB vs Whitin Machine Works*, 108 NLRB 1537, aff'd., 217 F2d 593 (CA 4-1955), cert. den., 349 US 905.

"'the underlying purpose of this statute (the National Labor Relations Act) is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.'"[14]

ARGUMENT

The question of the extent of the right of unions to compel disclosure by employers, of wage information generally, is one of the most urgent current problems arising under the National Labor Relations Act.[1] In addition to the case at bar in the Fifth Circuit, the question has been considered in at least eleven other cases in five other circuits.[2]

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[14] 220 F2d at p. 959, App. post, p. 17. Quoting from this court's opinion in *Brooks vs Labor Board*, 348 US 96, 103 (1954), involving informal repudiation by a majority of employees, of a union theretofore formally certified by the Board as bargaining agent of the group.

[1] Respondent has itself been constrained to make recent mention of "the unusually large number of cases coming before the Board involving this issue", and of "the disturbing effect upon collective bargaining of the disagreements which arise" in this connection. *NLRB vs Whitin Machine Works*, 108 NLRB 1537, aff'd., 217 F2d 593 (CA 4-1954), cert. den., 349 US 905.

[2] *Boston Herald-Traveler Corp. vs NLRB*, 1955-6 CCH Labor Law Reporter (4th ed.) 89,111, para. 69,249 (CA 1-1955); *NLRB vs Whitin Machine Works*, 217 F2d 593 (CA 4-1954), cert. den., 349 US 905; *NLRB vs Boston Herald-Traveler Corp.*, 210 F2d 134 (CA 1-1954); *NLRB vs New Britain Machine Co.*, 210 F2d 61 (CA 2-1954); *NLRB vs Otis Elevator Co.*, 208 F2d 176 (CA 2-1953); *NLRB vs Hekman Furniture Co.*, 207 F2d 561 (CA 6-1953); *NLRB vs Leland-Gifford Co.*, 200 F2d 620 (CA 1-1952); *NLRB vs Jacobs Mfg. Co.*, 196 F2d 680 (CA 2-1952); *NLRB vs Yawman & Erbe Mfg. Co.*, 187 F2d 947 (CA 2-1951); *NLRB vs Allison Co.*, 165 F2d 766 (CA 6-1948), cert. den., 335 US 814; *Aluminum Ore Co. vs NLRB*, 131 F2d 485 (CA 7-1942).

The facet of this over-all controversy which concerns the right of a union to enforce revelation of data as to merit wage increases is of particular importance.

This specific question, involved in this case, brings into sharp focus a basic conflict between the collective interest of a union on the one hand, and the several interests of its own individual members on the other.

A union can function efficiently only by bargaining for all of its members as an undifferentiated group, necessarily using only the highest common denominator for each category of all employees in the process.

This compelling collective interest of the union can rarely be reconciled with the several interests of its individual members seeking to forge their own advancements within the union beyond the common denominator which forms the motivating collective bargaining factor of the union without regard to individual merit.

That merit raises are inherently an unrealistic subject for union-employer negotiation, on these very grounds, is strongly evidenced by customary exclusion of provision therefor from collective bargaining agreements, particularly, as here, for editorial employees in the newspaper field.[3]

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[3] Cox, Archibald, and Dunlop, John T., *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harvard Law Review, 389, 407-411, especially 409 (1950); Randle, C. Wilson, *Collective Bargaining* (Houghton-Mifflin, Cambridge, Mass., 1951) 217; Davey, Harold W., *Contemporary Collective Bargaining* (Prentice-Hall, New York, 1951) 176. The subject was expressly excluded from the collective contract involved in the instant case. See footnotes 2 and 10, pp. 4 and 5, *supra*, and accompanying text.

Indiscriminate sanction of union constraint of employers to reveal merit-wage-increase information denied to the union by its own members, will inevitably tend to encourage collective bargaining on the issue, and concomitantly to discourage the stimulation of individual achievement among the members of the union within the union itself.

Documentation of the uniform hostility of union leadership to merit wage increases as tending toward inevitable impairment of their collective interests in favor of the individual interests of union members, and of the consequent inexpedience of such increases as a proper subject of collective bargaining, is found in contemporary treatises by leading authorities in the field of labor economics.[4]

Circumstances can hardly be envisaged in which grant to union leadership of access to such data against the will of the union's own members, could lead to aught but

[4] Bakke, E. Wright, *Mutual Survival* (Harper, New York, 1946) 59-60; Torff, Selwyn H., *Collective Bargaining* (McGraw-Hill, New York, 1953) 179; Randle, C. Wilson, *Collective Bargaining* (Houghton-Mifflin, Cambridge, Mass., 1951) 218; Lester, Richard A., *Labor and Industrial Relations* (MacMillan, New York, 1951) 173; Gilbertson, Henry S., *Personnel Policies and Unionism* (Ginn, Boston, 1950) 159; Woytinsky, Wladimir S., *Labor and Management Look at Collective Bargaining* (Twentieth-Century, New York, 1949) 164; Gardner, Burleigh B., *Human Relations in Industry* (Irwin, Chicago, 1947) 315; Cummins, E. E., and DeVyver, Frank T., *The Labor Problem in the United States* (Nostrand, New York, 1947) 198; Hill, Lee H., and Hook, Charles R., Jr., *Management at the Bargaining Table* (McGraw-Hill, York, Pa., 1945) 125-126.

aggravated inter-employee dissension of the very nature which existing labor legislation is intended to deter.[5]

In the case at bar, the Fifth Circuit has declared adherence to respondent's view that such information should nevertheless be subject to compulsory disclosure without a showing of any kind, on bare request by the union; and the court cited, in support of its holding, decisions by the Second and Fourth Circuits.

In *NLRB vs Yawman & Erbe Mfg. Co.*, the Second Circuit did announce a liberal yardstick for measuring "relevance" to the bargaining process, of a union's demands for wage data; but the court was careful to exclude from the import of its holding, inquiries "patently outside the bargaining issue".[6]

The Fourth Circuit's decision was expressly limited to information " 'reasonably available only from the employer's records' ".[7]

The instant judgment of the Fifth Circuit—ordering disclosure of information relating to a subject excluded by union and employer from their collective agreement, information most readily available to the union from its

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[5] "It is the attitude, currently, of unionism to seek an average wage for all workmen of an industry but to avoid singling out individual workmen for special compensation. Any such practice would immediately involve the leadership of the plant union in the unwelcome task of explaining to the larger part of its membership why the smaller part was thus favored." Millholland, Ray, *Pay Day* (Ginn, New York, 1946) 136.

[6] 187 F2d 947, 949 (CA 2-1951).

[7] *NLRB vs Whitin Machine Works*, 217 F2d 593, 594 (CA 4-1954), cert. den., 349 US 905. Quoting from respondent's own decision in the same case.

own members if they were willing to divulge it—obviously goes radically beyond both of the cited decisions on which it reposes.[8]

Equally misconceived, it is submitted, is the reliance of the court below on this court's recent *dictum* that "to allow employers to rely on employees' rights in refusing to bargain with the formally designated union . . . is inimical" to the purposes of the Act at issue.[9]

The decision from which the Fifth Circuit quoted involved no breach of a confidential relationship; and the right of the employees there concerned—to decline representation by a certified union—was expressly recognized by this court to be one which the employees themselves could protect through proper action before the National Labor Relations Board, and which accordingly required no protection by the employer.

But employees would have no recourse whatever from an order forcing the employer to reveal to the union, wage information which the employees have themselves refused to disclose.

Only through appropriate action by the employer can employees be protected against such invasion of their rights by the union.

In this aspect, the decision below is in conflict with the rationale of the First Circuit's approval of an employer's contention that "this case is inappropriate for dis-

[8] The First Circuit has recently followed the instant decision of the Fifth in ordering disclosure of individual merit-raise information without any showing of revelance to bargaining. *Boston Herald-Traveler Corp. vs NLRB*, 1955-6 CCH Labor Law Reporter (4th ed.) 89,111, para. 69,249 (CA 1-1955).

[9] 348 US 96, 103 (1954). *Vide* note 14, p. 7, *supra*.

closure of specific names and salaries because such disclosure violates not only the privacy of the employer but also the privacy of employees with respect to rates of pay, and we are not to assume that the Board would invade personal privacy without having some good reason which is lacking here, for the Respondent and the Union amicably reached an agreement, apparently satisfactory to both, without the benefit of specific individual wage data".[10]

It is respectfully submitted that allowance of certiorari herein is fully justified by this apparent inter-(and intra-)circuit conflict, in principle, by the legal and sociological significance of the question involved in this case, and by the out-ranging by the holding below, of all other prior decisions analogous to the important matter in controversy.

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July, 1955

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[10] *NLRB vs Boston Herald-Traveler Corp.*, 210 F2d 134, 136-37 (CA 1-1954). The present position of the First Circuit on this question is far from clear, however, in light of its more recent order in the same case for disclosure of individual merit-raise information without "the necessity of specific findings of relevance". *Boston Herald-Traveler Corp. vs NLRB*, 1955-6 CCH Labor Law Reporter (4th ed.) 89,111, 89,117, para. 69,249 (CA 1-1955).

APPENDIX

Opinion of the Court of Appeals, April 6, 1955

RIVES, Circuit Judge: The Board petitions for enforcement of its order issued against respondent[1] on June 30, 1954, requiring it to furnish the Union[2] upon request with the wages of each employee in the bargaining unit and the amount of any merit increase received by individually named employees during the preceding year. The Board's decision and order are reported at 108 N.L.R.B. 227.

The material facts are mainly undisputed, and concern a controversy which arose during the course of bargaining negotiations from August 27, 1952 to February 16, 1953 for renewal of a bargaining agreement which expired October 18, 1952. On August 19, 1952, the Union wrote respondent proposing a new contract which contained a clause reserving to the Union the right to bargain concerning individual merit increases and required respondent to inform the Union of all such merit increases granted. At the first bargaining conference on August 27, the Union requested from respondent wage information as to the name of each employee and his present salary, his length of service and accredited experience, the anniversary date of his employment, and the date and amount of any merit increases granted him within the preceding year. Though furnishing the Union with

[1] Respondent company publishes a large New Orleans newspaper.
[2] The Union here involved is Local 170 of the New Orleans Newspaper Guild, American Newspaper Guild (CIO).

some of the wage information requested, respondent refused to furnish the salary of each individual employee, as well as the amount of merit increase, if any, received by such employee during the preceding year. During subsequent bargaining negotiations, the Union insisted that it was entitled to all the wage information requested, and that it intended to prosecute an 8(a)(5) refusal to bargain charge which it had filed with the Board because of respondent's refusal to furnish all of the information sought. On February 16, 1953, respondent and the Union executed a new contract, which apparently gave no right to the Union to bargain concerning individual merit increases, and contained no provision requiring respondent to furnish the Union with the wage data previously requested. Irrespective of the new contract, however, the Union still insisted that it was entitled to the information which respondent had refused to furnish, particularly in view of a provision of the new contract permitting it to be reopened on or after October 10, 1953 for the revision of certain benefits.

Respondent's first insistence is that the good faith bargaining requirement of Section 8(a)(5) does not require it to disclose information, such as that here sought, which is not "legally relevant to any bargaining issue under the present or any previous contract." In the Second Circuit's per curiam decision in *N.L.R.B. v. Yawman & Erbe Mfg. Co.*, 187 F. 2d. 947, 949, it was held:

> "Since the employer has an affirmative statutory duty to supply relevant wage data, his refusal to do so is not justified by the Union's failure initially to show the relevance of the re-

quested information. The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it plainly appears irrelevant. Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issue."

This same "broad rule" was adopted by Chairman Guy Farmer for the Labor Board in the recent case of *N.L.R.B. v. Whitin Machine Works,* 108 N.L.R.B. No. 223, aff'd per curiam, 4th Cir., 217 F. 2d. 593, wherein he observed:

"* * this broad rule is necessary to avoid the disruptive effect of the endless bickering and jockeying which has theretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement."

We agree with the Fourth Circuit in the Whitin case, *supra*, that wage data appropriate for disclosure to a statutory bargaining representative in such instances "should not necessarily be limited to that which would be pertinent to a particular existing controversy" (217 F. 2d 594), but includes all information, such as that here sought, which appears reasonably necessary for "the policing of the administration of any contract." *N.L.R.B. v. Leland-Gifford Co.*, 1st Cir., 200 F. 2d. 620, 624.

Respondent next insists that the Union has heretofore waived its right to bargain or insist upon disclosure of information as to the only possible relevant issue of merit increases, through having committed, contractually and otherwise, the prerogative of granting such merit increases solely to respondent's managerial discretion. We think sound reasons exist for rejecting this contention. First, there exists no substantial evidence of the requisite "clear and unmistakable" waiver of the statutory right to such information by the bargaining agent here,[3] it appearing without substantial dispute that in the bargaining conferences which led to the signing of the new contract the Union clearly evidenced its intention not to abandon or waive its right to the information sought, but to seek redress from the Board for respondent's refusal to divulge it. Second, assuming arguendo that the new contract authorized respondent to bypass the Union in granting individual employee merit increases, such a construction of its terms would not ipso facto establish a waiver of the Union's right to obtain information as to

[3] See Tide Water Associated Oil Co., 85 N.L.R.B. 1096, 1098; California Portland Cement Co., 101 N.L.R.B. 1436, 1439.

the merit increases thus unilaterally granted. The right to grant merit increases without the consent of a statutory bargaining agent obviously should not imply the right to withhold information thereon, since such a rule might foster discrimination against union adherents in the granting of merit increases, and thereby promote that industrial strife and unrest which the Act seeks to avoid.

Finally, respondent insists that it should not be required to furnish the Union with confidential employee wage data, which the Union's own employee-members apparently refuse to disclose to it. But, even discounting to some extent respondent's affirmative duty to disclose such wage information upon request to its certified bargaining agent, we think no showing has been made that the wage information here sought is otherwise just as conveniently and accurately available to the Union through its own membership, or that it would be unreasonable or burdensome to require respondent to furnish it. Cf. *N.L.R.B. v. Whitin Machine Works, supra.* In any event, with reference to respondent's claimed confidential privilege to refuse disclosure on behalf of the employees involved, Mr. Justice Frankfurter's recent observation for the Court in *Brooks v. Labor Board,* 348 U.S. 96, 103, is appropriate for restatement here:

> "The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."

The order of the Board should be, and hereby is

ENFORCED.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 216

THE ITEM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 13-17) is reported at 220 F. 2d 956. The findings of fact, conclusions of law, and order of the Board (R. 50-70)[1] are reported at 108 NLRB 1634.

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[1] The symbol "R." refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

JURISDICTION

The judgment of the court below was entered on April 6, 1955. A petition for rehearing was denied on May 17, 1955. The petition for a writ of certiorari was filed on July 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board properly held that petitioner had failed to bargain, in violation of Section 8(a)(5) and (1) of the Act, by refusing to furnish the employees' statutory bargaining representative with information concerning the salary and the merit increases of each employee in the bargaining unit.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Petition, p. 3.

STATEMENT

I. The Board's Findings of Fact

Briefly stated, the Board found that petitioner, which publishes a large New Orleans newspaper, had violated Sections 8(a)(5) and (1) of the Act by refusing to furnish its employees' statutory bargaining representative with the name and salary of each employee in the bargaining unit and with the amount of the merit increase received by each employee during the preceding year. The facts, mostly undisputed, are summarized below.

During the period involved in this case and for some years prior thereto, the New Orleans News-

paper Guild, Local 170, American Newspaper Guild, CIO, herein called the Guild, was the designated collective bargaining agent of petitioner's employees in an appropriate bargaining unit (R. 58; 15-16, 18-19, B. A. 79). This case concerns a dispute which arose during the course of bargaining negotiations from August 27, 1952, to February 16, 1953, for renewal of a bargaining agreement which expired October 18, 1952 (R. 59-61; B. A. 15, 19, 47, 50, 79, 103).

By letter dated August 19, 1952, the Guild submitted to petitioner a proposed new contract containing a clause which reserved to the Guild the right to bargain concerning individual merit increases and required petitioner to inform the Guild of all merit increases granted (R. 59-60; B. A. 48-50, 107). At the first bargaining conference on August 27, 1952, the Guild, in a letter addressed and delivered to petitioner's general manager, requested petitioner to furnish it with the following wage information: the name of each employee, his present salary, the years of expereince credited to him, his length of service with petitioner, the anniversary date of his employment, and the date and amount of any merit inceases within the past year (R. 59-60; B. A. 15-16, 80, 84-85). Throughout the ensuing conferences, the Guild sought to obtain from petitioner all the wage information which it had requested in its letter of August 27, 1952 (R. 60-61; B. A. 16, 18-22, 23-25, 43-44). The Guild maintained that it was entitled to the information requested in order that it might bargain intelli-

gently for its members, and also in order that it might determine whether in the granting of merit increases any discrimination was being practiced against employees active in the Guild (R. 61; 15-17, 34-35, 47-50, 52-59).

During these bargaining conferences, petitioner opposed the Guild's proposal that the new contract contain language requiring petitioner to bargain with the Guild on individual merit increases or to notify the Guild of any merit increases made (R. 60; B. A. 73, 74). While furnishing the Guild with some of the wage information requested in the letter of August 27, 1952, petitioner refused the Guild's repeated requests for the salary of each individual employee and for the amount of merit increase received by each employee during the past year (R. 51, 60, 61; B. A. 31-32, 76, 77, 80-81, 86-94). Petitioner contended that it had furnished the Guild with all the information it had requested and to which it was entitled (R. 59, 62; R. 7, B. A. 25-26, 27, 73-74, 76-77, 80-81).

On November 19, 1952, the Guild filed the charge in this case with the Board, alleging that petitioner had violated Section 8(a)(5) and (1) of the Act, in refusing to furnish the information which the Guild had requested (R. 61; R. 7-11, B. A. 18-19). Bargaining conferences then continued, the Guild maintaining its position that it was entitled to all the wage data it had requested from petitioner, that it was not waiving its statutory right to such information, and that it intended to prosecute the charge which it had filed with the Board (R. 61, 64; B. A. 17-20, 23-24, 28-30, 37, 43-44, 47-52, 76, 78).

On February 16, 1953, the parties finally executed a new contract without any provision requiring petitioner to provide the Guild with the type of information it had previously requested (R. 61-62; B. A. 17-20, 24-25, 76, 95). At the hearing in this case the Guild evidenced its continuing desire to obtain the information which petitioner has refused to furnish it; Guild representatives urged that such information would be of use in connection with a clause in the new contract authorizing its reopening on or after October 10, 1953, and for the purpose of policing the administration of other portions of the new contract (R. 61, 63; B. A. 23-25, 37-43, 44, 52-59, 101-102).

II. The Board's Conclusions and Order

Rejecting petitioner's contentions that it had furnished the Guild with all the requested information which was relevant and necessary for bargaining and that the Guild had waived its right to the further information requested by signing the contract on February 16, 1953, the Board concluded that petitioner had violated Sections 8(a)(5) and (1) of the Act by refusing, since September 22, 1952, to furnish the Guild with the wages of each employee in the bargaining unit and with the amount of the merit increase, if any, which each individual received during the preceding year (R. 51, 65). The Board accordingly ordered petitioner to cease and desist from the unfair labor practice found. Affirmatively, the Board ordered petitioner to furnish the Guild upon request "the names identified with the respective merit in-

creases, if any, granted to the employees in such unit during the preceding year, and the exact wages of each employee in the unit," and to post the usual notices (R. 52-53).

III. The Decision of the Court Below

The court below, following similar holdings by the Courts of Appeals for the First, Second, and Fourth Circuits, enforced the order of the Board (Pet. 13-17). Rejecting petitioner's contention that the information sought was not relevant to any bargaining issue, the court observed that the right of the bargaining representative to wage data was not "limited to that which would be pertinent to a particular existing controversy," since the possession of such information is necessary for "the policing of the administration of any contract" (Pet. 16). The court below further noted that the Guild's waiver of its right to bargain over merit increases did not establish a waiver of the right to receive information as to the increases granted (Pet. 16-17). Finally, in answer to petitioner's claim that the Guild should obtain the information from the employees, the court observed that there was no showing that the data was "just as conveniently and accurately available" in that way "or that it would be unreasonable or burdensome to require [petitioner] to furnish it" (Pet. 17). The court also rejected petitioner's attempt to assert a claim on behalf of the employees that the information was privileged and confidential (*ibid.*).

ARGUMENT

As counsel for petitioner notes (Pet. 2), the question here presented is identical to that which this Court recently declined to review in *Whitin Machine Works* v. *National Labor Relations Board*, 349 U. S. 905, denying certiorari to review 217 F. 2d 593 (C. A. 4). For the reasons stated in our brief in opposition in the *Whitin* case (No. 641, October Term, 1954), we submit that certiorari should likewise be denied here.[2]

Since merit increases have long been recognized as among the matters as to which the statute requires collective bargaining,[3] petitioner's apprehension that disclosure of merit increases "will inevitably tend to encourage collective bargaining on the issue" (Pet. 9) which petitioner regards as "inherently an unrealistic subject for union-employer negotiation" (Pet. 8), furnishes no basis for granting the writ.

Petitioner, in repeating (Pet. 9-12) the argument advanced in *Whitin* (see Petition in No. 641,

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[2] To the authorities collected at p. 6, n. 3 of the *Whitin* opposition should be added not only the *Whitin* case itself but also the opinion of Judge Magruder, speaking for the First Circuit, in *Boston Herald-Traveler Corp.* v. *National Labor Relations Board*, 36 LRRM 2220. This decision confirms our interpretation of the earlier *Boston Herald* decision (210 F. 2d 134, see *Whitin* opposition, p. 7, n.) and disposes of petitioner's suggestion of conflict (Pet. 11-12).

[3] *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766, 768 (C.A. 6), certiorari denied, 335 U.S. 814; *National Labor Relations Board* v. *Berkley Machine Works*, 189 F. 2d 904, 907-908 (C.A. 4); see also *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346-347; *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 338-339.

October Term, 1954, pp. 13-14) that the Guild should get the information only from those employees who are willing to divulge it, overlooks this Court's recent observation in *Brooks* v. *National Labor Relations Board,* 348 U. S. 96, 103, that "In placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency." Petitioner's argument that some employees may wish to withhold from the bargaining representative information as to their wage rates is, in fact, a further reason for requiring the employer to release the information. See *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 487 (C. A. 7); *J. H. Allison & Co.,* 70 NLRB 377, 385, enforced, 165 F. 2d 766 (C. A. 6), certiorari denied, 335 U. S. 814; *Electric Auto-Light Co.,* 89 NLRB 1192, 1198-1199; *Hekman Furniture Co.,* 101 NLRB 631, 639-640, enforced, 207 F. 2d 561, 562 (C. A. 6). Cf. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 338-339.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1955.

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Supreme Court of the United States

October Term, 1955

No. 216

THE ITEM COMPANY
Petitioner

versus

NATIONAL LABOR RELATIONS BOARD
Respondent

SUPPLEMENT TO THE PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 216

THE ITEM COMPANY

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD

Respondent

SUPPLEMENT TO THE PETITION FOR CERTIORARI

The purpose of this supplement is to invite the court's attention to the divided decision of the Labor Board rendered on August 26, 1955 in *International News Service vs American Newspaper Guild.*[1] That case, like the instant case, poses questions as to the nature and extent of the right of unions to demand from employers information as to merit wage increases.

In the cited case, as in the case at bar, the union, in bargaining with the employer for a new collective agree-

[1] 113 NLRB No. 130. The principal, concurring and dissenting opinions of the members of the Board are printed in the appendix hereto.

ment, had proposed to reserve to itself "the right to bargain on individual merit increases". However, as in the case at bar, when the agreement was signed, it contained instead a continued reservation to the employer of the exclusive prerogative to grant merit wage increases without reference to the union.

As in the case at bar, the union had requested specific and detailed information as to merit wage increases granted by the employer, stating that the request was made "in order to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals".

It was held by the Board and by the Court of Appeals in the case at bar that, in such circumstances, the union is entitled to enforcement of its demand for such information for the stated purposes.

In the cited recent decision of the Board, it is held, directly to the contrary, that by signing an agreement reserving to the employer the exclusive prerogative of granting merit increases, the union lost any right to the requested information.[2]

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[2] The rationale of the principal opinion of the Board is that "it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt, some three months later, to disturb the terms of the bargain the parties themselves achieved. The give and take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other parties to the agreement had every good reason to believe had been stabilized for a definite period."

The dissenting members of the Board point out that this decision is in specific and basic conflict with the decision of the Board and of the Court of Appeals in the case at bar, as well as with other decisions on the question at issue.

It is respectfully submitted that the need for authoritative clarification of the issue presented, and the consequent propriety of certiorari, in this case, are emphasized by the contradictory character of respondent's rulings on the important and clouded question in controversy.

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September, 1955

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL NEWS SERVICE DIVISION OF THE HEARST CORPORATION

and Case No. 2-CA-3507

AMERICAN NEWSPAPER GUILD, CIO

INTERNATIONAL NEWS PHOTOS DIVISION OF THE HEARST CORPORATION

and Case No. 2-CA-3508

AMERICAN NEWSPAPER GUILD, CIO

DECISION AND ORDER

On October 18, 1954, Trial Examiner Max M. Goldman issued his Intermediate Report in the above-entitled consolidated proceedings finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent has not violated the Act in certain

other respects and recommended dismissal of the complaint insofar as it contains allegations concerning such violations. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the Union filed a reply brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Trial Examiner found that the Respondent violated Section 8 (a) (5) of the Act by refusing to comply with the Union's request for information showing, among other things, the specific salaries of the Respondent's employees and the amounts of merit increases the respective employees had been given. In addition to other arguments, the Respondent contends that the Union waived whatever right it may have had to receive this information by negotiating and signing its 1953-1955 bargaining agreement with the Respondent. We agree with this contention.

For a number of years, the Union has been the collective bargaining representative of employees in the Respondent's International News Service and International News Photos Divisions. In this capacity, the Union has negotiated a series of bargaining agreements covering these employees. These contracts did not provide for the payment of fixed wages and salaries. Instead, the contracts established a series of minimum rates, with each contract providing that merit increases, that is wages and salaries above the required minima, would be arrived at

by negotiation between the Respondent and individual employees. This was the general scheme of the parties' contract that was effective from April 1952 to April 21, 1953. That contract included a clause, Article II, that required the Respondent to furnish the Union with a list of the employees covered, together with their experience ratings and classifications.[1]

In April 1953, the parties began to negotiate the renewal of their 1952-1953 agreement. At the first session, on April 27, the Union presented a mimeographed document containing specific proposals for the new contract, including a proposal to continue the schedule of minimum rates. The Union proposed, however, a change in the practice with respect to merit increases, proposing that it be given "the right to bargain on individual merit increases," and that "The Employer shall inform the Guild of all merit increases granted in accordance with the provisions of Article IV." By Article IV, the union proposed that instead of the above described Article II of the 1952-1953 contract, the following clause be substituted:

> 1. Within 15 days after the signing of this contract the Employer shall supply the Guild with a list containing the following information for all employees then on the payroll:
>
> (a) Name, address and telephone number.

[1] Article II of the 1952-1953 contract states. "Within fifteen days after the signing of this contract, the employer agrees to supply to the Guild a list of employes by bureaus who are governed by the terms of this contract, with experience rating, classifications and their designation as permanent or replacement employes. Additions to or subtractions from this list will be supplied monthly to the Guild."

(b) Date of hiring.

(c) Classification.

(d) Experience rating and experience anniversary.

(e) Salary, including a description of commission or bonus arrangements.

2. The Employer shall notify the Guild monthly in writing of:

(a) All merit increases granted by name of the employe, individual amount, and effective date.

(b) Step-up increases paid by name of the employe, individual amount, and effective date.

(c) Changes in classification and any salary changes by reason thereof.

(d) Resignations, retirements, deaths and any other revisions in the data listed in Section 1.

3. Within one week after the hiring of a new employe the Employer shall furnish the Guild in writing with the data specified in Section 1 for each such new employe.

In bargaining conferences that followed the April 27 meeting, the parties were unable to agree on the terms of a new contract. A Federal Mediator was thereupon called in, and on May 20, in the latter's presence, the parties discussed the Union's proposed information clause. On May 22, the Union, acting at the Mediator's suggestion, prepared a written list of the contract subjects that the

Union considered of primary importance, and those that it considered to be of lesser significance. Listed in the first category of 7 subjects, that is items of greatest weight and priority, were such disputed matters as "Grievance Procedure," "Minimum Wages," and "Severance Pay." The subject of "Information" was listed in the second category of 16 subjects, that is items of lesser weight, which included the subjects of "Preamble" and "Miscellaneous." Also on May 22, again at the Mediator's suggestion, the parties designated a two-man subcommittee, composed of Thomas R. Breslin for the Respondent, and Stephen Ripley for the Union, to continue the negotiations.

At the second meeting of the subcommittee, on June 1, Ripley agreed to abandon the Union's original proposal with respect to the furnishing of information, and to include in the new contract the above-described Article II of the 1952-1953 contract with the addition of a requirement that the Respondent would furnish the Union with the employees' addresses and experience anniversary dates. The subcommittee met again on June 8, but did not discuss the "information" matter. On June 9, the subcommittee reported to the Mediator, and listed the items as to which agreement had not been achieved. These were chiefly items that had appeared on the Union's May 22 list of priority items. The subject of "information" was not reported as an item then in dispute. On June 12, after approximately 20 meetings, the parties reached complete agreement on the terms of a new contract.

This contract, effective from April 21, 1953, to April 21, 1955, followed the scheme of the earlier agreements, in that it established a series of minimum rates. It also reflects the Union's abandonment of its initial proposal on merit increases, for, like its predecessors, the 1953-1955 contract provides that merit increases shall be arrived at by negotiation between the Respondent and the individual employees. As executed, the 1953-1955 contract contains the "information" clause agreed upon by the negotiating subcommittee on June 1.[2]

Explaining the negotiations between himself and Breslin, Ripley testified that the Union abandoned its original proposal because "we were entitled to the information anyway legally." He testified that the Union conveyed the idea to the Respondent that the Union "could go to the National Labor Relations Board, or court, or wherever we had to go to get it." However, he could not recall specifically when, or to whom, such a statement was made in the course of the bargaining negotiations. Breslin testified that when Ripley agreed to the abandonment of the Union's original "information" proposal, Ripley made it clear that he was so doing because "this information was not essential or vital to the Guild." Breslin categorically denied that he or, as far as he knew, any other representative of the Respondent was told dur-

[2] Article III of the 1953-1955 contract provides:
Within fifteen days after the signing of this contract, the employer agrees to supply to the Guild a list of employes by bureaus w_o are governed by the terms of this contract, with address, experience anniversary, experience rating, classifications and their designation as permanent or replacement employes. Additions to or subtractions from this list will be supplied monthly to the Guild. Within two weeks after the hiring of a new employe, the employ shall furnish the Guild with the foregoing data.

ing formal bargaining session that the Union was abandoning its proposal because it was believed that legal procedure could be invoked to get the information.

As the Trial Examiner found, the Respondent complied with the 1953-1955 contract by supplying the Union with all the information that was required by the above-described Article III of its terms. Nevertheless, on September 9, 1953, the Union requested the Respondent to furnish the following information:

1. The name of each employe, listed by job title and department.
2. His salary, and the dates and amounts of any regular commissions and bonuses paid him during the past year.
3. The years of experience credited to him.
4. His length of service with the company.
5. His date of hiring and anniversary date.
6. The dates and amounts of any merit increases paid him during the past year.
7. Details of the formulas used in the computation and payment of commissions, bonuses and merit increases.

The Union wrote that its request was being made "in order to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals." The Respondent refused the Union's request, pointing out that no grievances had been filed and that no wage proposals were then pending.

Although the Board has said repeatedly that statutory rights may be waived by collective bargaining,[3] it has also said that such a waiver will not readily be inferred. It has thus required that there be "a clear and unmistakable showing" that the waiver occurred.[4] On the facts of this case we hold that the Union "clearly and unmistakably" bargained away any right it had to receive the information it requested on September 9.[5]

What the Union asked for on September 9 was almost precisely the portion of its May 27 information proposal that the Respondent had refused to assent to, and which the Union had, in fact, abandoned, in the course of the bargaining negotiations for the 1953-1955 contract. Some 20 bargaining sessions had been required before the parties had reached agreement on the terms of that contract. During several of those sessions, the parties had addressed themselves to the Union's "information" proposal, and the Union clearly revealed that it attached less importance to that proposal than it did to other matters in issue. It is significant, too, we think that not only did the Union in the course of the bargaining abandon its original "information" proposal, but it also abandoned its original proposal that it be accorded the right to bargain on individual

[3] See, for example, *Shell Oil Company, Incorporated*, 77 NLRB 1306 (right to strike); *Tidewater Associated Oil Company*, 85 NLRB 1096, 1098 (right to bargain concerning a pension plan); *Shell Oil Company*, 93 NLRB 161, 164 (right to negotiate grievances); *E. W. Scripps Company*, 94 NLRB 227, 228 (right to bargain concerning merit increases).

[4] *Tidewater Association Oil Company, supra.* See also *E. W. Scripps Company, supra; California Portland Cement Company*, 101 NLRB 1436, 1438-1439; *Hekman Furniture Company*, 101 NLRB 631, 632.

[5] See *General Controls Company*, 88 NLRB 1341, 1342; *Hughes Tool Company*, 100 NLRB 208, 209; *Avco Manufacturing Corporation*, 111 NLRB No. 118, pp. 2-5.

merit increases. For, as the factual recital above shows, the Union related its proposal that it be given information on individual merit increases with its proposal that it be consulted on the granting of such increases. Thus, the Union's abandonment of the latter proposal gives a cogent reason for the relatively less weight the Union attached to its "information" proposal than to other subjects, and, indeed, tends to indicate the reason for its ultimate abandonment.

But on the facts before the Board, what the reason was that motivated the Union—whether it was because it abandoned its merit increase proposal, or whether it was, as Ripley testified, because the Union believed that legal sanction could be invoked to procure what it was seeking, or whether it was for some other reason not shown in the record—we need not here decide. Nor need we decide whether or not the Union's September 9 request was relevant or necessary for the reasons it advanced when it made the request. For the controlling fact that clearly emerges from the entire course of the parties' bargaining is that the Union, having proposed an "information" clause for the 1953-1955 contract more inclusive than the one in the 1952-1953 contract, consciously yielded in the face of the Respondent's objections, and accepted something less than it originally proposed. What the parties ultimately agreed upon, moreover, was the "information" clause of the 1952-1953 contract modified to include a part of the Union's original proposal. And this agreement was in fact written into the express terms of the bargaining contract the parties executed.

In these circumstances, we believe it would be an abuse of the Board's mandate to throw the weight of Government sanction behind the Union's attempt, some three months later, to disturb the terms of the bargain the parties themselves achieved. The give and take of the bargaining table is undoubtedly a better place than the Board's offices for resolving disputes as to the type and amount of informational data parties to collective bargaining contracts must give to each other. Where, as here, the parties have themselves decided the issue at the bargaining table, the issue has been taken away from the Board and there is no need for it to interfere. To hold otherwise is to encourage one party to a bargaining agreement to resort to the Board's processes to upset the terms of a contract which the other party to the agreement had every good reason to believe had been stabilized for a definite period.[6]

Members Murdock and Peterson state in their dissent that, in reaching our decision herein, we have departed from precedent. We have not. The issue of whether there has been "a clear and unmistakable" waiver is necessarily a question of fact that can be decided only upon the specific facts of the particular case. Like our dissenting colleagues we have read and carefully analyzed and compared the cases cited by them in their dissent. In our considered judgment, each of those cases is factually distinguishable from the instant case. No case relied upon by Members Murdock and Peterson involved a situation, as here, in which it was shown that the parties not only bargained *pro* and *con* with respect to an information

[6] See Chairman Herzog's concurring opinion in *The Jacobs Manufacturing Company*, 94 NLRB 1214, 1227-1228.

clause, but also, having come to terms on the matter, inserted in their contract, not what one party originally sought, but a measure that compromised their differences. It follows, therefore, that the cases relied upon by Members Murdock and Peterson cannot be controlling here.

Accordingly, as it appears that the Respondent supplied the information to which the Union could lay claim under the 1953-1955 contract, and as a majority of the Board so agrees, we shall dismiss the complaints against the Respondent.

ORDER

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaints herein against International News Service and International News Photos Divisions of the Hearst Corporation be, and they hereby are, dismissed.

Dated, August 26, 1955, Washington, D. C.

Guy Farmer, Chairman
Philip Ray Rodgers, Member
NATIONAL LABOR RELATIONS BOARD

BOYD LEEDOM, MEMBER, concurring:

I concur that the complaints should be dismissed but I do not believe it is necessary to reach the problem of waiver.

Considering the time of the demand for the information, with respect to the wage reopening provision of the contract, and the failure to establish specific need for the data, in the absence of apparent necessity at the time of the request, I would dismiss. Lacking such a showing, the Employer's failure to supply information is not failure to bargain in good faith.

Dated, August 26, 1955, Washington, D. C.

Boyd Leedom, Member
NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK and IVAR H. PETERSON, MEMBERS, dissenting:

In these cases Chairman Farmer and Member Rodgers, with the concurrence of Member Leedom, have decided that this Employer did not violate Section 8 (a) (5) of the Act by refusing to furnish a Union with wage data concerning the employees it represents. In so deciding they have deprived this Union of necessary and relevant information essential to the intelligent representation of these employees. For the first time in the history of Board and court decisions in this area of labor relations, the assertion is made that to require the employer to furnish more information than the amount specified in a contract would be "an abuse of the Board's mandate." According to Chairman Farmer and Member Rodgers, the "give and take of the bargaining table" is "a better place than the Board's offices" to resolve disputes of this nature.

Indeed, they hold that where the parties have contracted concerning informational data "the issue has been taken away from the Board and there is no need for it to interfere." These conclusions are not only novel; in our opinion, they present a basic misconception of the Board's function in administering this Act. Is it an abuse of the Board's mandate to require an employer to furnish a union with information which the latter finds essential to effectively exercise its duty of representing employees under Section 9 (a) of the Act? In other cases Chairman Farmer[7] and Member Rodgers[8] themselves have subscribed to the Board and Court established rule that it is the obligation of an employer to furnish such information to a Union to make collective bargaining effective. Did the Board abuse its mandate in those cases too? Why were the employers in those cases ordered to furnish the requested information if the bargaining table was the better place to resolve those disputes? Why should the Board have interfered there, but not here? Chairman Farmer and Member Rodgers are saying, in effect, to this Union: "You now have half the tools you need to carry out your obligations to these employees. You did not successfully insist at the bargaining table, a better place than the Board's offices, that you be given all of them; it is therefore your own fault and not the Board's if you cannot represent these employees effectively."

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[7] *Boston Herald-Traveler Corporation*, 110 NLRB 2097, enforced 223 F. 2d 58 (C. A. 2); *Whitin Machine Works*, 108 NLRB 1537, enforced 217 F. 2d 593 (C. A. 4), cert. denied 349 U.S. 905; *The Item Company*, 108 NLRB 1634, enforced 220 F. 2d 956 (C. A. 5).

[8] *Utica Observer-Dispatch, Inc.*, 111 NLRB No. 6; *Whitin Machine Works, supra; The Item Company, supra.*

It has been the consistent position of the Board and the courts that the furnishing of wage information to a Union is a *prerequisite* to effective collective bargaining. Certainly, it is the business of this Board to see to it that the Union be furnished this data, which is in the employer's possession and can be supplied without the imposition of an unreasonable or undue burden. Otherwise the Board will have failed to carry out the Congressional mandate to foster and encourage collective bargaining. In our view, this mandate does not permit the Board to stand by with arms folded and solemnly declare that there is "no need to interfere" when one of the parties is crippled by the absence of information without which it cannot fulfill its role in collective bargaining.

To support their finding that the Employer did not violate Section 8 (a) (5) of the Act, Chairman Farmer and Member Rodgers hold that the Union "bargained away" or "abandoned" its right to this information in the course of negotiating and executing a contract. The extended discussion of the parties' negotiations for a new contract in 1953, which appears in their decision, reveals that the Union originally requested complete informational data, but finally executed a contract in which the Employer agreed to furnish the Union with some but not all of such data. Chairman Farmer and Member Rodgers concede that there is some evidence in the record that the Union did not insist that the Employer agree to furnish all the information because it believed that the Employer was legally obligated to furnish such information, whether or not the contract so provided. There is, in addition, evidence in the record, contrary to the suggestion of Chair-

man Farmer and Member Rodgers, that the Union's position as to this issue was specifically made known to the Employer. Stephen Ripley, a Union negotiator, testified that he had submitted a brief to Federal Mediator Bernard J. Forman, which set forth the Union's position that it had a legal right to such information. On cross-examination Respondent's negotiator, Thomas J. Breslin, admitted that he had read the Union's brief at the time it was presented to the mediator and that he was therefore aware of the Union's position that it had a right, apart from any contractual agreement, to be provided with the desired information.

The Board and the courts have uniformly recognized that to deny a union information necessary to its role as bargaining representative would create a serious impediment to the processes of collective bargaining.[9] Such a right has been held to be statutory in nature,[10] deriving from the union's authority under Section 9 (a) of the Act to represent employees and the employer's corollary duty under Section 8 (a) (5) to engage in good faith collective bargaining. Numerous defenses, including the argument that the Union had "waived" its right to such information, have been rejected time and again.[11] The Board has held,

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[9] *Utica Observer-Dispatch, Inc., supra; Boston Herald-Traveler Corporation, supra; The Item Company, supra; Whitin Machine Works, supra; Leland-Gifford Company,* 95 NLRB 1306, enforced 200 F. 2d 620 (C.A. 1); *Yawman & Erbe Manufacturing Company,* 89 NLRB 881, enforced 187 F. 2d 947 (C.A. 2); *N.L.R.B. v. J. H. Allison & Company,* 165 F. 2d 766 (C.A. 6), cert. denied 335 U. S. 905.

[10] *N.L.R.B. v. The Item Company, supra; N.L.R.B. v. Yawman & Erbe Manufacturing Company, supra; California Portland Cement Company,* 101 NLRB 1433, 1439.

[11] *Utica Observer-Dispatch, Inc., supra; Post Publishing Co.,* 102 NLRB 648; *Hastings & Sons Publishing Company,* 102 NLRB 708; *Hekman Furniture Co.,* 101 NLRB 631, enforced 207 F. 2d 561 (C.A. 6); *N.L.R.B. v. Leland-Gifford Co., supra.*

with judicial approval, that any purported waiver by a union of so important and necessary a right must be a "specific" waiver in language "clear and unmistakable" or "clear and unequivocal."[12] Chairman Farmer and Member Rodgers, however, find solely on the basis of the execution of a contract containing an agreement that the employer would furnish less information than was originally requested, that the union "clearly and unmistakably" waived its right to the additional necessary information. Obviously they would substitute what at best is an implied waiver from silence or ambiguous conduct for the judicially approved doctrine that nothing less than a "clear and unequivocal" waiver will suffice. We believe that this decision is on its face wrong.

Our view that there was no clear waiver in this case is supported by the decisions of numerous Circuit Courts of Appeal. Rejecting a similar contention, the Sixth Circuit Court of Appeals held in the *Allison* decision:

> Nor do we see logical justification in the view that in entering into a collective bargaining agreement for a new year, even though the contract was silent upon a controverted matter, the union should be held to have waived any rights secured under the Act, including its right to have a say-so as to so-called merit increases. Such interpretation would seem to be disruptive rather than fostering in its effect upon collective bargaining, the national desideratum disclosed in the broad terms of the first section of the National Labor Relations Act.

[12] *N.L.R.B. v. The Item Company, supra; California Portland Cement Company, supra; Tide Water Associated Oil Company,* 85 NLRB 1096; *E. W. Scripps Company,* 94 NLRB 227; *General Controls Co.,* 88 NLRB 1341.

In *N.L.R.B. v. Otis Elevator Company*,[13] the Second Circuit Court of Appeals set forth a contractual provision in which the employer agreed to furnish specific information relating to time study statistics. The Court then held as follows:

> Respondent . . . contends that this sets forth his entire obligation to impart information and constitutes a waiver of any additional union right. We cannot agree. In the atmosphere of collective bargaining in labor relations it is reasonable to require that the parties set forth the terms on which they have agreed. But *the drawing of broad inferences of waiver from their silence would be disruptive rather than fostering amicable relations.* [Citing *N.L.R.B. v. J. H. Allison Company, supra.*] The language quoted from the contract carries the implication of a general intent to keep the operator informed as to the development of time studies affecting him. In the absence of an express provision this should not be read as limiting requests on behalf of the employees for information, but rather as in general supporting them. We think, therefore, that the general principle of free access to information relevant to bargainable issues must apply. (Emphasis supplied.)

In the *Leland-Gifford* case[14] the Union, as in the instant cases, had requested complete data for bargaining purposes and was supplied by the Company with something less in contract form. In that case the parties had even included a clause in the contract to the effect that the

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[13] 208 F. 2d 176 (C. A. 2).
[14] *Leland-Gifford Company, supra.*

agreement represented the entire agreement between the parties, as indicated below. Nevertheless, the Board held:

> The Respondent's contention that the Union bargained away the right to request the individual wage data is apparently based on the fact that *the 1948 contract contained provisions requiring the disclosure by the Respondent of certain information* (not including that in issue here), and a further clause which stated, "This agreement contains the entire agreement between the parties and no matters shall be considered which are covered by the written provisions stated herein." We need not decide, as the Trial Examiner did, whether this clause was operative during the period in 1950 covered by the complaint herein, for we are satisfied that, in any event, *the clause in question was not intended, and cannot be construed, as a waiver by the Union of its right to obtain data* necessary to the effective administration of a contract. (Emphasis supplied except on phrase "right to obtain data.")

The First Circuit Court of Appeals,[15] finding that the Respondent's duty to furnish information under the circumstances of that case did not "require extended consideration," enforced this portion of the Board's Order, citing numerous precedents. Again in *N.L.R.B. v. Yawman & Erbe Manufacturing Company*[16] the Second Circuit Court of Appeals held that the Union had a right to such information even though a contract had been executed without its disclosure:

> Nor is our determination that the information was relevant affected by the subsequent execu-

[15] *N.L.R.B. v. Leland-Gifford Company, supra.*
[16] *Supra.*

> tion of a contract without disclosure. The most that can be inferred from the Union's action is that the advantages of a contract in hand outweigh those which the Union might later obtain when all relevant information would be available to it.

In the twenty years since the Board was first established and entrusted with the function of administering this Act, no Board or court decision has found a waiver of the Union's right to such information on the ground that the Union was able to secure some, but not all, of the necessary information through voluntary agreement of the employer; rather such a doctrine has been specifically rejected by Courts of Appeal. Information of this nature is the essential means by which a Union may become sufficiently informed to bargain about substantive matters in discharging its duties under Section 9 (a) of the Act as the bargaining representative of these employees. We do not believe that the Board should deprive a union of so vital an instrument to effectuate this statutory purpose. We would not do so unless the union in clear and unequivocal language had agreed, as it has not in these cases, to waive its right under the statute. We believe it too late in the day to ignore or overrule all judicial authority on this doctrine.

In his concurring opinion Member Leedom takes the position that he would dismiss the complaint without considering whether or not the Union had waived its right to the information requested. He cites neither Board nor court decisions in support of his conclusion that "the employer's failure to supply information is not failure

to bargain in good faith." That conclusion is, we believe, contrary to long established law in this area of labor relations, including the most recent decisions of the First, Second, Fourth and Fifth Circuit Courts of Appeal.

It appears to be Member Leedom's position that the Employer was not required to supply the data requested on the grounds (1) the Union's request for information was not timely with respect to the wage reopening clause; (2) the Union failed to establish a "specific need" for the data. A third phrase, "the absence of apparent necessity at the time of the request," would seem to be included in the two grounds already stated.

As set forth in the Intermediate Report, the information requested by the Union related to the names, salaries, and merit increases of the employees it represented. We do not understand Member Leedom's decision as challenging the relevancy of this information to bargainable issues; nor does he dispute the settled precedents cited above, holding that a union has a statutory right to such information. He exonerates the Employer from failure to cooperate in collective bargaining because, it appears, the Union did not ask for the information at a time when it needed it for bargaining purposes. The record shows that the 1953-1955 contract contained a provision permitting either party to reopen the contract on the issue of wages on or before February 21, 1954. It is apparently this reopening clause to which Member Leedom refers when he finds that the Union's request for wage information on September 9, 1953, some five months before the contract could be reopened, was "not timely." We have,

we believe, reviewed every Board and Court case involving the issue of an employer's duty under Section 8 (a) (5) of the Act to furnish information data to a union representing its employees. As indicated above, numerous and varied defenses have been raised by employers to support their refusal to supply such information. In only one of those cases, however, has the defense been specifically raised that a union's request for information was not timely because it was made some months before actual contract negotiations were to begin. That case is *Hastings & Sons Publishing Company.*[17] There the contracts in issue were to terminate on April 6, 1952. The union originally requested information on July 13, 1951, and the employer refused the request on August 17, 1951. The Board affirmed the Trial Examiner's rejection of the Respondent's contention that requests for information would be timely only if made during the 60 day period prior to the termination of the contract:

> Nor do I find merit to the Respondent's contention that the requests for information were inappropriate and proper only during the 60 days prior to the termination of the contract, since such information at reasonable times during the contract year would enable the Union as the statutory bargaining representative to determine whether the contract is being fairly and impartially administered. The policing of an agreement is an essential function of the Union.[18]

The rarity of defenses of this nature becomes understandable upon examination of the leading decisions deal-

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[17] *Supra.*
[18] *Ibid,* at page 715.

ing with this issue. On June 6, 1955, the First Circuit Court of Appeals handed down its decision in *Boston-Herald Travelers Corporation v. N.L.R.B.*[19] The court in that case quoted as the rule "consonant with and best calculated to effectuate the purpose of the Act" that set forth in the concurring opinion of Chairman Farmer in the *Whitin*[20] case, in which he held:

> . . . I would, therefore, hold that, short of evidence that union requests for wage data are used as an harassing tactic and not in a good faith effort to secure pertinent bargaining information, the employer has a continuing obligation to submit such data upon request to the bargaining agent of his employees . . . . I am convinced, after careful consideration of the import of the problem on the collective bargaining process, that this broad rule is necessary to avoid the endless bickering and jockeying which has heretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. *I conceive the proper rule to be that wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement.* (Emphasis supplied.)

[19] 223 F. 2d 58 (C. A. 1).
[20] *Supra*, at page 1541.

In *N.L.R.B. v. New Britain Machine Company*[21] the Second Circuit Court of Appeals affirmed the Board's finding that the employer had violated Section 8 (a) (5) of the Act by refusing to furnish data to a union. In that case the Board affirmed the Trial Examiner's holding:[22]

> Unless the information is 'plainly irrelevant' [Citing *Yawman & Erbe Mfg. Co., supra*] it must be submitted. The information has been held essential and relevant not only in the negotiation of wage questions, but also to protect the Union's 'proper interest in the manner in which an employer administers an existing contract,' and for 'policing' it. [Citing *Leland Gifford Co., supra; California Portland Cement, supra.*]

In the *Whitin*[23] case the Fourth Circuit Court of Appeals cited with approval the Board's decision. The quoted portion included the Board majority's agreement with the concurring opinion of Chairman Farmer:

> . . . In this respect, we agree with the statement of our concurring colleague, that in these cases it is sufficient that the information sought by the union is related to the issues involved in collective bargaining, *and that no specific need as to a particular issue must be shown.* (Emphasis supplied.)

Again, on April 6, 1955, the Fifth Circuit Court of Appeals held in *N.L.R.B. v. The Item Company*[24] as follows:

> We agree with the Fourth Circuit in the *Whitin* case, *supra*, that wage data appropriate for dis-

[21] 210 F. 2d 61 (C. A. 2).
[22] *New Britain Machine Company*, 105 NLRB 646, 650.
[23] *Supra.*
[24] *Supra.*

> closure to a statutory bargaining representative in such instances 'should not necessarily be limited to that which would be pertinent to a particular existing controversy' . . ., but includes all information, such as that here sought, which appears reasonably necessary for 'the policing of the administration of any contract.' [Citing *N.L.R.B. v. Leland-Gifford Co., supra.*]

The above cases are illustrative of the well settled rule, appearing in numerous cases throughout the history of the Board, that a union may request and an employer is obliged to furnish necessary information data *before, during or* after actual contract negotiations so long as the information is relevant to bargainable issues or policing the contract. In its letter of September 9 the Union stated that the information was requested in order "to police the existing contract, bargain intelligently, and evaluate properly our own and management's wage proposals." We believe that the Union's need for the information at the time it was requested is apparent on both grounds although, as the cases indicate, it is sufficient that the information was required to police the existing contract. The Respondent was asked to furnish the information by October 15, 1953. Certainly, four months is not too long a period to study the facts, hold membership meetings, and marshall arguments in support of ultimate bargaining positions.

We are convinced, for the reasons set forth above, that there was neither a waiver by the Union of its right to

the information requested, as Chairman Farmer and Member Rodgers find, nor was the request untimely, as Member Leedom finds. We therefore dissent.

Dated, August 26, 1955, Washington, D. C.

Abe Murdock, Member
Ivar H. Peterson, Member
NATIONAL LABOR RELATIONS BOARD

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 216

THE ITEM COMPANY, *Petitioner*

v.

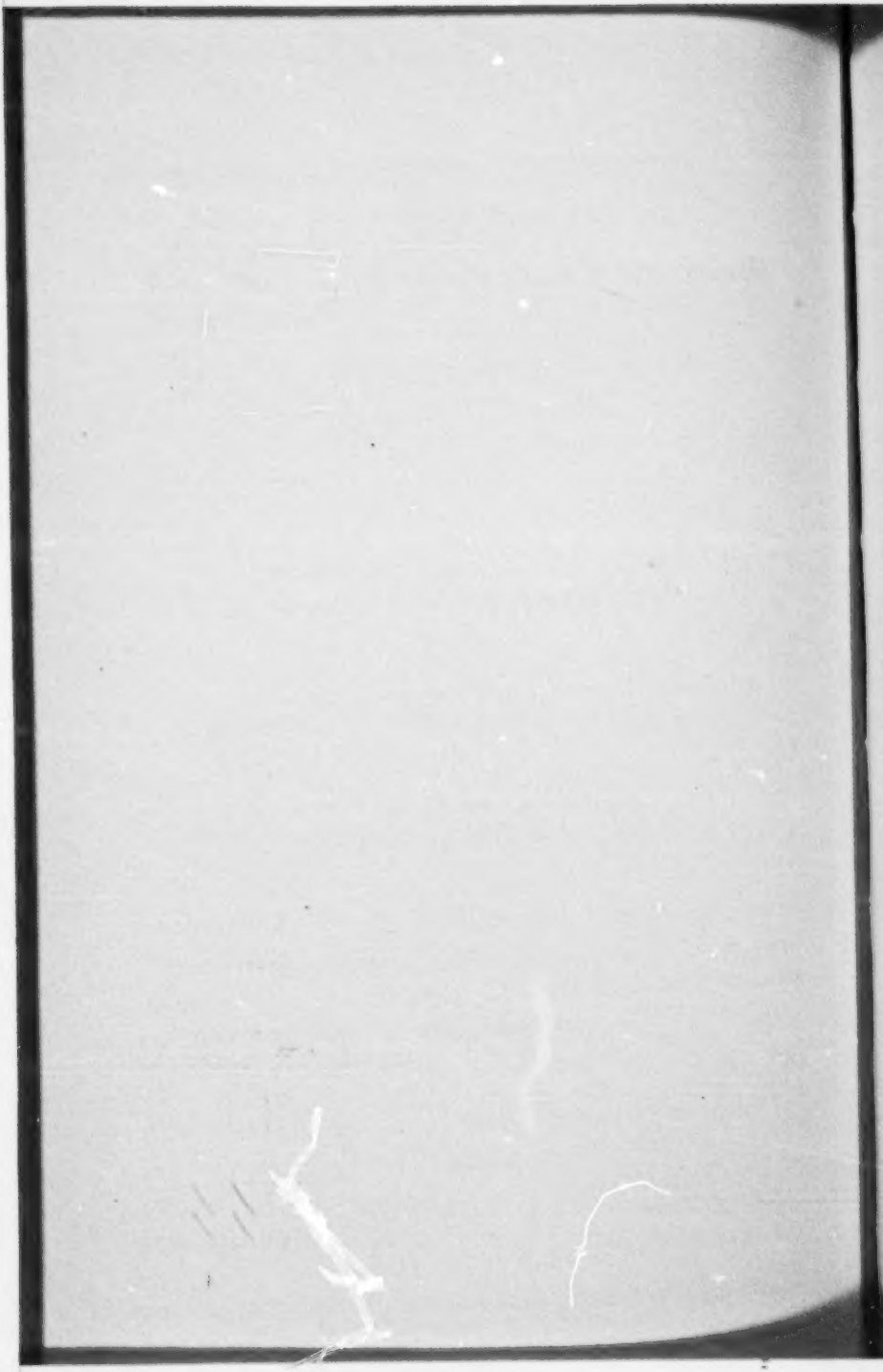
NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REHEARING

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IN THE

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OCTOBER TERM, 1955

No. 216

THE ITEM COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR REHEARING

The Item Company petitions the court to grant a rehearing of its petition for certiorari herein, denied by order of October 10, 1955.

The question at issue is whether a union may, without regard to relevancy in collective bargaining, require disclosure by an employer of information as to merit wage increases granted to union members without improper discrimination.

The ground of this petition is that since application for certiorari was filed, the National Labor Relations

Board has itself reversed its own position sought to be reviewed herein, and the members of that Board have fallen into complete disagreement as to the scope and application of the rule of the instant case.

In petitioner's supplement to its petition for certiorari, it called attention to *International News Service* v. *American Newspaper Guild*,[1] expressly reversing, by a divided Board, the position which the Board had taken in the instant case, as evidenced by the vigorous opinion of its dissenting members citing the instant case.

In *Oregon Coast Operators Association*,[2] Chairman Farmer of the Board who had spoken for its majority in *American Newspaper Guild* on the very same day, took exception to the Board's order as inconsistent with its position in the latter opinion.

The extent of disagreement as to scope and application of the rule of the instant case is further illustrated by other opinions of the Board also handed down since the petition for certiorari was filed.[3]

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[1] 113 NLRB No. 130 (August 26, 1955).

[2] 113 NLRB No. 127 (August 26, 1955). See also the companion case of *Long Bell Lumber Company*, 113 NLRB No. 128 (August 26, 1955).

[3] *Taylor Forge & Pipe Works*, 113 NLRB No. 65 (August 16, 1955); *Westinghouse Electric Corporation*, 113 NLRB No. 105 (August 25, 1955). See also *Cone Bros. Contracting Company*, 114 NLRB No. 62 (October 10, 1955—the day on which the instant petition for certiorari was denied by this court).

This conflict of opinions is opposed to traditional concepts of judicial administration, and brings into sharp focus the need for this court's authoritative clarification of the issue presented.

Respectfully submitted,

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Of Counsel

November 3, 1955

Certificate

I certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified by Rule 58 of this court.

New Orleans, November 3, 1955.